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No. 21]

NEW DELHI, SATURDAY, SEPTEMBER 2, 2000/BHADRA 11, 1922

इस भाग में निम्न पृष्ठ संख्या दी जाती है बिचते कि यह जलग संकलन के रूप में
रखा जा सके

Separate Paging is given to this Part in order that it may be filed as a
separate compilation

भाग II—खण्ड 3—उप-खण्ड (III) PART II—Section 3—Sub-section (III)

केन्द्रीय अधिकारियों (संघ राज्य क्षेत्र प्रशासन को छोड़कर) द्वारा जारी किये गये आदेश और अधिसूचनाएँ
Orders and Notifications issued by Central Authorities (other than the Administrations of Union Territories)

भारत निर्वाचन आयोग
आदेश

नई दिल्ली, 7 अगस्त, 2000

आ.प्र.132.—यतः निर्वाचन आयोग का संवधान हो गया है कि नीचे की सारणी के स्तम्भ (2) में यथा विनिर्दिष्ट बिहार राज्य से लोक सभा के साधारण निर्वाचन, 1999 के लिए जो स्तम्भ (3) में विनिर्दिष्ट निर्वाचन क्षेत्र से हुआ है, स्तम्भ (4) में उसके सामने विनिर्दिष्ट निर्वाचन लड़ने वाला प्रत्येक अभ्यर्थी लोक प्रतिनिधित्व अधिनियम, 1951 तथा तद्दीन बनाए गए नियमों द्वारा अपेक्षित उक्त सारणी के स्तम्भ (5) में यथादशित अपने निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल रहे है ;

और यतः उक्त अभ्यर्थी ने सम्यक् सूचना दिए जाने पर भी उक्त असफलता के लिए कोई कारण प्रयत्न स्पष्टीकरण नहीं दिया है और निर्वाचन आयोग का संवधान हो गया है कि उनके पास उक्त असफलता के लिए कोई पर्याप्त कारण या न्यायोचित्य नहीं है ;

अतः अब, निर्वाचन आयोग उक्त अधिनियम की धारा 10क के अनुसरण में नीचे की सारणी के स्तम्भ (4) में विनिर्दिष्ट व्यक्तियों को संसद के दोनों सभागों में से किसी का या किसी राज्य की विधान सभा या

विधान परिषद् का सदस्य चुने जाने और सदस्य होने या रहने के लिए इस आदेश की तारीख से तीन वर्ष की कालावधि के लिए निरहित घोषित करता है :—

सारणी

| क्रम सं. | निर्वाचन का विवरण | निर्वाचन क्षेत्र की क्रम संख्या और नाम | निर्वाचन लड़ने वाला अभ्यर्थी का नाम और पता | निरहता का कारण |
|----------|---|--|---|--|
| 1 | 2 | 3 | 4 | 5 |
| 1. | बिहार राज्य से लोक सभा के लिए साधारण निर्वाचन, 1999 | 24—पूणियां | श्री कुलदीप मंडल महबूब खां टोला काली मंदिर पोस्ट—भट्टा बाजार, जिला— पूणियां, बिहार । | निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल । |
| 2. | —वही— | —वही— | श्री नागेश्वर सिंह ग्राम + पो.—ओरलाहा थाना—बड़हरा कोठी, जिला—पूणियां, बिहार । | —वही— |

[सं. 76/बिहार—लो.स./2000]

आदेश से,

बी. एन. चावला, सचिव

ELECTION COMMISSION OF INDIA
ORDER

New Delhi, the 7th August, 2000

O.N. 132.—Whereas, the Election Commission is satisfied that each of the contesting candidate specified in column (4) of the Table below at the General Election to the House of the People from Bihar State, 1999 as specified in column (2) held from the constituency specified in column (3) against his/her name has failed to lodge any account of his/her election expenses at all as required by the Representation of the People Act, 1951, and the rules made thereunder as shown in column (5) of the said Table :

And Whereas, the said candidates have either not furnished any reason or explanation for the said failure even after due notice and the Election Commission, after considering the representation made by them, if any, is satisfied that they have no good reason or justification for the said failure;

Now, therefore, in pursuance of section 10A of the said Act, the Election Commission hereby declares the persons specified in column (4) of the Table to be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State for a period of three years from the date of this order.

TABLE

| S. No. | Particulars of election | Number and name of the constituency | Name and address | Reason of disqualification |
|--------|--|-------------------------------------|---|--|
| 1 | 2 | 3 | 4 | 5 |
| 1. | General Election to the House of the People, 1999. | 24—Purnea | Sh. Kuldeep Mandal, Mahboob Khan Tola, Kali Mandir, P.O. Bhatha Bazar, Distt. Purnea, Bihar. | Failure to lodge any account of election expenses. |
| 2. | —do— | —do— | Sh. Nageshwar Singh, Vill + Post—Orlaha, P.S.—Barahara-Kothi, Distt.—Purnea, Bihar. | —do— |

[No. 76/BR—HP/2000]

By Order,

B. N. CHAWLA, Secy.

आदेश

नई दिल्ली, 7 अगस्त, 2000

आ. अ. 133.—यतः भारत निर्वाचन आयोग का समाधान हो गया है कि बिहार राज्य में 12-शिवहर संसदीय निर्वाचन क्षेत्र से 1998 में होने वाले लोक सभा के साधारण निर्वाचन में निर्वाचन लड़ने वाला अभ्यर्थी श्री हरि किशोर सिंह, ग्राम+पो. डुमरी टोल डंगराहा, थाना-मैजरगंज, जिला सीतामढ़ी, बिहार ने लोक प्रतिनिधित्व अधिनियम, 1951 और उसके अधीन बनाये गए नियमों द्वारा यथा अपेक्षित अपने निर्वाचन व्ययों का कोई भी लेखा दाखिल करने में असफल रहा है ;

और यतः उक्त अभ्यर्थी ने सम्भव सूचना दिये जाने पर भी असफलता के लिए कोई कारण अथवा स्पष्टीकरण नहीं दिया है और निर्वाचन आयोग का यह समाधान हो गया है कि उनके पास उक्त असफलता के लिए कोई पर्याप्त कारण या न्यायोचित नहीं है ;

अतः अब, निर्वाचन आयोग उक्त अधिनियम की धारा 10-क के अनुसरण में श्री हरि किशोर सिंह को संसद के दोनों सदनों में से किसी का या किसी राज्य की विधान सभा या विधान परिषद का सदस्य चुने जाने और सदस्य होने या रहने के लिए इस आदेश की तारीख से तीन वर्ष की कालावधि के लिए निरहित घोषित करता है ।

[सं. 76/बिहार-लो.स./2000]

आदेश से,

बी. एन. चावला, सचिव

ORDER

New Delhi, the 7th August, 2000

O.N. 133.—Whereas, the Election Commission is satisfied that Shri Kishore Singh, Vill. & P.O. Dumri, Tole-Dungraha, P S. Mejorganj, Distt. Sitamarhi, Bihar, a contesting candidate at the General Election to the House of the People held in 1988 from 12-Sheohar Parliament Constituency in Bihar State has failed to lodge any account of his election expenses as required by the Representation of the People Act, 1951 and the rules made thereunder;

And Whereas, the said candidate has either not furnished any reason or explanation for the said failure even after due notice and the Election Commission, after considering the representation made by him, if any, is satisfied that he has no good reason or justification for the said failure;

Now, therefore, in pursuance of section 10A of the said Act, the Election Commission hereby declares the said Shri Hari Kishore Singh to be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of State for a period of three years from the date of this order.

[No. 76/BR-HP/2000]

By Order,

B. N. CHAWLA. Secy.

नई दिल्ली, 8 अगस्त, 2000

आ. अ. 134.— लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 22 की उप-धारा (1) द्वारा प्रदत्त शक्तियों का प्रयोग करते हुए, भारत निर्वाचन आयोग पंजाब सरकार के परामर्श से अपनी अधिसूचना सं. 434/पंजाब-लो.स./98(2), तारीख 12 जनवरी, 1998 में निम्नलिखित संशोधन करता है अर्थात् :—

उक्त अधिसूचना से संलग्न सारणी से स्तम्भ 1 में “1. 1-गुरदासपुर संसदीय निर्वाचन क्षेत्र के लिए रिटर्निंग ऑफिसर”, प्रविष्टि के सामने उसके स्तम्भ 2 में पड़े रही विद्यमान प्रविष्टि, “अपर उपायुक्त, गुरदासपुर” के स्थान पर “जिला विकास और पंचायत अधिकारी, गुरदासपुर” शब्द रखे जायेंगे ।

[सं. 434/पंजाब-लो.स./2000(2)]

आदेश से,

के. आर. प्रसाद, सचिव

New Delhi, the 8th August, 2000

O.N. 134.—In exercise of the powers conferred by sub-section (1) of Section 22 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission of India in consultation with the Government of Punjab hereby makes the following amendments in its notification No. 434/PB-HP/98(2), dated 12th January, 1998, namely :—

For the existing entry “Additional Deputy Commissioner, Gurdaspur” appearing in column 2 of the table appended to the said notification against the entry “1. Returning Officer for 1-Gurdaspur Parliamentary Constituency” in column 1 thereof, the words “District Development and Panchayat Officer, Gurdaspur” shall be substituted.

[No. 434/PB-HP/2000(2)]

By order,

K. R. PRASAD, Secy.

नई दिल्ली, 18 अगस्त, 2000

आ. अ. 135.— भारत निर्वाचन आयोग, 1998 की निर्वाचन अर्जी संख्या 5 (दयानन्द सहाय बनाम शिवू सोरेन) में, पटना स्थित उच्च न्यायालय के तारीख 10-5-2000 के आदेश को लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में एतद्वारा प्रकाशित करता है ।

[निर्णय अधिसूचना के अंग्रेजी भाग में उपा है ।]

[सं. 82/रा.स.-बिहार/5/98/2000]

आदेश से,

शरन पाल सिंह, सचिव

New Delhi, the 18th August, 2000

O.N. 135.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission of India hereby publishes the order of the High Court of Bihar at Patna dated 10-5-2000 in Election Petition No. 5 of 1998 (Dayanand Sahay vs. Shibu Soren)

Election Petition No. 5 of 1998

In the matter of an application under Sections 80 and 81 of the Representation of the People Act, 1951

Daya Nand Sahay.

...Petitioner.

Versus

Sri Shibu Soren and others.

...Respondents.

For the Petitioner : M/s. H. K. Lal, Amrendra Kumar Singh and Suraj Bansh Roy, Advocates.

For Respondent No. 1 : M/s. Shashi Shekhar Dwivedi, Sr. Adv., Pandit Jee Pandey, Barun Kr. Sinha and Miss Rita Kumari No. 1, Advocates.

For Respondent No. 2 : M/s. Jayanand and Udai Shankar Saran Singh, Advocates.

For Respondent No. 3 : Mr. Ashok Kumar Advocate.

For Respondent No. 7 : Mrs. Upasana Dubey Tiwary and Mr. Anurag Kumar Dubey, Advocates.

PRESENT :

The Hon'ble Mr. Justice R. N. Sahay.

R. N. Sahay, J.—This is an application under Sections 80 and 81 of the Representation of People Act, 1951 calling in question the election of respondent No. 1 Sri Shibu Soren to the Council of States. The petitioner has further sought declaration that he be declared to be duly elected to the Council of States in the election held in 1998.

2. The President of India under Section 12 of the Representation of People Act, 1951 called upon the elected members of the Bihar Legislative Assembly to elect seven members to the Council of States in biennial election held in 1998. The Secretary of the Legislative Assembly Bihar was appointed as the Returning Officer. The petitioner and the respondent Nos. 1 to 7 filed their nominations on the date fixed for this purpose. On scrutiny the Returning Officer found that all the nominations were in order and accepted them as valid. The petitioner and respondent Nos. 1 to 7 contested the election to seven seats from the State of Bihar to the Council of States. Poll was held on 18-6-1998 and on that very day counting of votes was completed. The Returning Officer declared respondent Nos. 1 to 7 duly elected to the Council of the States. The petitioner lost the election.

3. The petitioner seeks declaration that the election of respondent No. 1 was void and illegal since he was subject to disqualification as prescribed under Article 102(a) of the Constitution of India as he held an office of profit under the State of Bihar being nominated Chairman of the interim Council of Jharkhand Area Autonomous Council constituted by the State Government under Sections 23(1), (2), (3) of the Jharkhand Area Autonomous Council Act, 1994.

4. Jharkhand Area Autonomous Council Act, 1994 (in short 'JAAC Act') was enacted by Bihar Act 13 of 1994 which extends to the Districts of entire Santhal Pargana and Chotanagpur Area as mentioned in Schedule 1 of the Act. Section 3 of the said Act empowers the State Government to establish an autonomous council which shall consist not more than 162 directly elected members and not more than 18 nominated members. The Council shall be a body corporate which shall have a perpetual succession and a common seal and right to acquire, hold and dispose of movable and immovable property within and without the limits of the Council Area and it may sue and be sued by the aforesaid name. Section 5 of the said Act deals with the qualification for the membership of the Council. Section 13 of the Act provides manner in which the members can be nominated to the Council.

Section 15 of the Act provides that the Council shall have a Chairman, who shall be a member of the Scheduled Tribes. The Chairman shall be elected by the elected members of the Council from amongst them.

5. For the purpose of this case, Sections 23 and 26 of the Act are very relevant. Section 23 of the Act provides as follows :—

"23. Constitution of Interim Council and Interim Executive Council.—(1) The State Government before constitution of the Council under Section 3, may constitute an Interim Council.

(2) The State Government shall nominate 50 per cent members of the Interim Council out of its total membership from the members of the Lok Sabha and the Legislative Assembly representing the constituency which lies wholly or mostly in the Area and from the members of the Rajya Sabha and Legislative Council, who are the inhabitants of the area and the remaining 50 per cent members shall be nominated from amongst the persons who are inhabitants of the area and have interest in its development.

(3) The State Government shall nominate the Chairman and the Vice-Chairman of the Interim Council. Provided that a member of the Scheduled Tribes can only be nominated as the Chairman.

(4) The State Government shall constitute an Interim Executive Council from amongst the members of the Interim Council.

(5) The Chairman and the Vice-Chairman of the Interim Council shall be the Ex-Officio Chief Executive Councillor and Vice-Chief Executive Councillor.

(6) The duration of the Interim Council and the Interim Executive Council shall be for 6 months or till the constitution of the Council under Section 3 whichever is earlier.

(7) The Chairman and the Vice-Chairman of the Interim Council and the Members of the Interim Executive Council shall hold their office during the pleasure of the State Government."

6. Section 26 of the Act provides as follows :—

"26. Honorarium and allowances to the Chairman, Vice-Chairman and Members.—(1) Honorarium worth Rs. 1,750, Rs. 1,250 and Rs. 1,000 per month shall be payable to the Chairman, Vice-Chairman and the Members of the Executive Council respectively.

(2) Save as under clause (1), honorarium of Rs. 750 per month shall be payable to the remaining members.

(3) The Chairman, the Vice-Chairman and the Members of the Executive Committee shall be paid daily allowance at the rate of Rs. 150 per day for the period spent outside the Headquarters for the work of the Council and the other members shall be paid daily allowance at the rate of Rs. 125 per day for taking part in the meetings of the Council.

(4) On the tour undertaken by the Chairman, the Vice-Chairman and the members of the Executive Council for the works of the Council and by the members of the Council to attend the meeting of the Council, a first class or Air-Conditioned 2 tier railway fare which has actually been paid, shall be payable. Provided that on journey by Air undertaken for the works of the Council by the Chairman and the Vice-Chairman, the fare actually paid, shall be payable."

7. Admittedly, respondent No. 1 was Chairman of the Interim Council when he filed nomination for election to the Council of States. The nominated Chairman and Vice-Chairman and members of the Interim Council hold office during the pleasure of the State Government [Sub-Section (7) of Section 23] but the Chairman of the regular Council is not removable by the State Government. It is also clear from

section 26 of the Act that the Chairman of the Interim Council is entitled for honorarium worth Rs. 1,750 apart from daily allowances etc.

8. The contention of the petitioner is that by virtue of holding office of Chairman of Interim Council the respondent No. 1 derived a pecuniary gain of Rs. 1,750 per month in addition to daily allowances at the rate of Rs. 120 per day for attending the meeting of the Interim Council and Rs. 150 per day for the period spent outside the Headquarter for the work of the Council. These amounts have to be paid to him out of the JAAC fund in which bulk of the amount comes from the grants and loan given to it by the State Government out of the public Exchequer of Bihar and also from taxes and fees imposed by the Council. The respondent No. 1 by virtue of being Chairman of the Interim Council has to perform some functions for the State Government such as preparation of budget as per section 38 of the aforesaid Act and sending the said budget for inclusion in the State Budget. The State Government exercises control over the Council by requiring the Council to furnish information to the Government as per section 41 of the Act, by giving direction for the guidelines of the Council under section 42 of the Act. The election of the autonomous Council has not been held so far and the Interim Council and the Interim Executive Council have been kept alive by various subsequent amendments in the Act.

9. The moot question for consideration is whether respondent No. 1 suffered disqualification and if so he was protected under section 3 of the Parliament (Prevention of Disqualification) Act, 1959, Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 provides that none of the offices mentioned in (a) to (j) in so far as it is an office of profit under Government of India or the Government of any State, shall disqualify the holder thereof for being chosen as, or for being, a member of Parliament.

10. Respondent No. 1 in his written statement asserts that being the Chairman of the Interim Council he did not hold any office of profit of the State Government. The respondent has further asserted that the petitioner ought to have raised objection regarding disqualification of respondent No. 1 before the Returning Officer and since no objection was raised, the petitioner was barred from challenging the election of respondent No. 1 and was validly accepted by the Returning Officer. Respondent No. 1 has referred to relevant provision of JAAC Act and submits that respondent No. 1 was not earning any profit rather he was drawing only honorarium and allowances and hence it cannot be said that he was holding office of profit of the State Government. Respondent No. 1 has taken shelter of section 3 of the Parliament (Prevention of disqualification) Act, 1959 and submitted that even if the respondent No. 1 held an office of profit, his disqualification has been removed. It is submitted that as there is no relationship of master and servant between the Government and the Chairman of the Interim Council, it cannot be held that respondent No. 1 held the office under the State Government much less office of profit.

11. In the Additional Written Statement filed on behalf of the respondent No. 1, it is stated that the respondent No. 1 ceased to draw any allowance much prior to filing of the nomination paper for the election in question. It is further submitted that the respondent No. 1 by virtue of being Chairman of the Interim Council enjoyed the status and other privilege of Minister within the State, hence disqualification is removed under section 3 of the Parliament (Prevention of Disqualification) Act, 1959.

12. It was lastly submitted that in view of the provisions contained in Article 103 of the Constitution of India, the question whether respondent No. 1 has become subject to any disqualification mentioned in Clause (1) of Article 102, can only be decided by the President.

13. This contention is devoid of any merit. As held in Election Commission of India Vs. Saka Venkata Rao AIR 1953 S.C. 210. Articles 193(3) and 192(1) of the Constitution of India are applicable only to the disqualification to which a member becomes subject to after he is elected as such, and it does not apply to pre-existing disqualification.

14. Learned council for the petitioner has relied on Ramnaram Ramgopal Chamediya Vs. Sri Ramchandra Jagoba Kadu AIR 1958 Bomby 325. In this decision it was held by a Division Bench of Bombay High Court that the source from which the salary is paid to a person holding office is not necessarily the sole test to determine whether he is holding an office under the State Government. The principal criterion is whether the appointment to the office and removal therefrom of a person is under the control of the State Government. If it be so, then it could safely be said that that person holds an office under the State Government.

15. In Divya Prakash Vs. Kuldar Chand Rana, AIR 1975 S.C. 1067, the election of the elected candidate to Himachal Pradesh State Legislative Assembly was challenged on the ground that he being nominated Chairman of the Himachal Pradesh Board of School Education under section 18 of the Himachal Pradesh Board of School Education Act, 1969 held the office of Profit. The Hon'ble Supreme Court held on consideration of relevant provisions of Himachal Pradesh Board of School Education Act, 1969 that though the Chairman was nominated by the Government, there was nothing in the said Act about the authority competent to remove the Chairman from his office. It was not disputed that the office of the Chairman of the Board was an office under the State Government. Hon'ble Supreme Court held that the Chairman held the office of the State Government but it was not an office of profit since he was appointed only in an honorary capacity. It was held that the question was whether the holding of the office as Chairman of the Board resulted in any profit of that office, however, small that profit may be. Following the ratio in Karbhari Bhimaji Rohamare Vs. Shankar Rao Genuji Kolhe, AIR 1975 S.C. 575, it was observed.

"In the absence of any profit accruing to the 1st respondent as a result of the holding of the office of Chairman it cannot be said that he was holding an office of profit. This is not even a case where the Chairman was appointed to an office and a salary was provided for him by the order of appointment or he was entitled to a salary as a result of the appointment and he gave up his right to the salary. The order of appointment itself was one made in an honorary capacity."

Hon'ble Supreme Court further held that there was no provision in the Himachal Pradesh Board of School Education Act relating to salary payable to the Chairman.

16. In Karbhari Bhimaji Rohamare Vs. Shankar Rao Genuji Kolhe, AIR 1975 S.C. 575, the Hon'ble Supreme Court considered the meaning of "honorarium" and "compensatory allowance". It was observed :

"6. The whole controversy centres around the honorarium payable to the members of the Wage Board. It is contended on behalf of the appellant that item 11 specifically lays down that the compensatory allowance shall mean the travelling allowance, the daily allowance or such other allowance which is paid to the holder of the office for the purpose of meeting the personal expenditure in attending the meeting of the Committee or body or in performing any other function as the holder of the said office, and honorarium which is not mentioned there cannot be brought within the meaning of the words "such other allowance". I found in that item as it is not an allowance. Reference is made to the dictionary meaning of the word 'honorarium' and it is said that while the daily allowance is expected to meet the expenses of the member concerned while attending the meeting of the Board, the honorarium is in the form of a fee for performing his duties on those days. The Shorter Oxford Dictionary gives the meaning of the word 'honorarium' as an honorary reward, a fee for professional service rendered, while one of the meanings of the word 'salary' is, fixed payment made periodically to a person as compensation for regular work, remuneration for services rendered, fee honorarium. Thus, in one aspect honorarium and fee are used almost as though they are interchangeable terms. Even so, what was paid to the 1st respondent cannot be said to be a salary. It was not a fixed payment made periodically as compensation for regular work. We do not think that the dictionary meaning is of much help there.

We are of opinion that the matter must be considered as a matter of substance rather than of form, of the essence of payment rather than its nomenclature. Even so, it is urged on behalf of the appellant that the payment of honorarium in this case could not have been for any purpose other than payment for services rendered on particular days on which the meetings of the Wage Board were held. We are not able to accept this contention." (underlining is mine).

17. In *Ravanna Subanna Vs. G. S. Kaggeerappa*, AIR 1954 S.C. 653, it was observed :

"The word 'profit' connotes the idea of pecuniary gain. If there are really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carried any profit." (Emphasis added).

18. In *Umrao Singh Vs. Darbara Singh*, AIR 1969 S.C. 262, the successful candidate was the Chairman of a Panchayat Samiti. He was paid Rs. 100 a month as a consolidated allowance for performing all official duties of the Panchayat. He was also allowed daily allowance at the rate of Rs. 6 per day of official work performed outside the district. It was held that the consolidated allowance was not salary, remuneration or honorarium but was clearly an allowance paid for the purpose of ensuring that the Chairman of the Panchayat Samiti did not have to spend money out of his own pocket for the discharge of his duties.

19. In *Ramappa Vs. Sangappa*, AIR 1958 S.C. 937, it was held as follows :—

"An office has to be held under someone for it is impossible to conceive of an office held under no one. The appointment being by the Government, the office to which it is made must be held under it, for there is no one else under whom it can be held."

20. In *Karbhari Bhimaji Rohamare's* (supra), the elected candidate had led evidence to the effect that the aggregate of the honorarium and the daily allowance payable to the 1st respondent was hardly sufficient to meet the personal expenditure incurred for the purpose of attending the meeting in Bombay. Hon'ble Supreme Court held that the law regarding the question that the person holding the office can be interpreted reasonably having regard to the circumstances of the case and the times with which one is concerned, as also the class of person to which this case is dealing with and this question has to be looked in a realistic way. In this context, it was observed :—

"..... Merely because part of the payment made to the 1st respondent is called honorarium and part of the payment daily allowance, we cannot come to the conclusion that the daily allowance is sufficient to meet his daily expenses and the honorarium is a source of profit. A member of the Wage Board cannot expect to stay in Taj Hotel and have a few drinks and claim the expenditure incurred, which may come perhaps to Rs. 150 to Rs. 200 a day, for his personal expenses. In such a case it may well be held to give him a pecuniary gain. On the other hand he is not expected to live like a sanyasi and stay in a dharamshala and depend upon the hospitality of his friends and relatives or force himself upon them. Nobody with a knowledge of the expenditure likely to be incurred by a person staying at a place away from his home could fail to realise how correct the assessment of the learned Judge is. We are satisfied that the payment made to the 1st respondent cannot be a source of profit unless he stays with some friends or relatives of stays in a dharamshala. The appellant has not satisfied the test or discharged the burden pointed out by this Court in *Umrao Singh's* case (1969) 1 SCR 421 = (AIR 1969 SC 262)."

21. In *Abdul Shakur Vs. Rihab Chand*, AIR 1958 S.C. 52, relied upon by Sri Dwivedi, learned senior counsel for the respondent No. 1, the appellant before the Supreme Court

was the Manager of a school run by a Committee, named, Durgah Khwaja Sahib Akbari. He was appointed by the Administrator of Durgah Khwaja Sahib Akbari and was paid Rs. 100 per month. The question arose whether he was disqualified to be chosen as member of legislature in view of Article 102(1)(a) of the Constitution of India. It was contended in that case that under section 5 and 9 of Durgah Khwaja Sahib Act, 1955 the Government of India has power to appoint and remove the members of the Committee and has also power to appoint administrator and therefore the appellant was under the control and supervision of the Central Government and thus he was holding an office of profit under the Government of India. This contention was rejected by the Supreme Court. The Supreme Court upheld the election of the appellant on the ground that the appellant was not appointed by the Government nor was liable to be dismissed by the Government. The appointment was made by the Administrator of the Committee and he was liable to be dismissed by the same Committee. The Supreme Court observed :—

"The power of the Government to appoint a person to an office of profit or to continue him in that office or revoke his appointment at their discretion and payment from out of Government revenues are important factors in determining whether that person is holding an office of profit under the Government."

22. This decision does not support the contention of the respondent No. 1 that he was not holding office of profit. It is clear from the decision that the appellant was not appointed by the Government but by the Administrator.

23. In *Guru Gobinda Basu Vs. Sankari Prasad Ghosal*, AIR 1964 S.C. 254, decisive test was held to be the test of appointment. It would be relevant to quote para 14 of the report :—

"14. There again the decisive test was held to be the test of appointment. In view of these decisions we cannot accede to the submission of Mr. Chaudhuri that the several factors which enter into the determination of this question the appointing authority, the authority vested with power to terminate the appointment, the authority which determines the remuneration, the source from which the remuneration is paid, and the authority vested with power to control the manner in which the duties of the office are discharged and to give directions in that behalf must all co-exist and each must show subordination to Government and that it must necessarily follow that if one of the elements is absent, the test of a person holding an office under the Government, Central or State, is not satisfied. The cases we have referred to specifically point out that the circumstance that the source from which the remuneration is paid is not from public revenue is a neutral factor not decisive of the question. As we have said earlier whether stress will be laid on one factor or the other will depend on the facts of each case. However, we have no hesitation in saying that where the several elements, the power to appoint, the power to dismiss, the power to control and give directions as to the manner in which the duties of the office are to be performed and the power to determine the question of remuneration are all present in a given case, then the officer in question holds the office under the authority so empowered."

This decision lends support to the contentions of the petitioner.

24. In *Shivamurthy Swami Vs. Azadi Sanganna Andanappa*, 1971(3) Supreme Court Cases 870, it was observed as follows :—

"... In other words, the office in question must have been held under a Government and to that some pay, salary, emoluments or allowance is attached. The word 'profit' connotes the idea of pecuniary gain. If there is really a gain, its quantum or amount would not be material; but the amount of money receivable by a person in connection with the office he holds may be material in deciding whether the office really carries any profit—see *Revanna Subanna Vs. G. S. Kaggeerappa*...."

25. Mr. Dwivedi, learned senior counsel for the respondent no. 1 placed reliance on *Starucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev*, AIR 1992 S.C. 1959. This decision is of no help to the respondent no. 1. In this case it was held that the government had control over the appointing authority but not over the teachers and hence it was held that the teachers cannot be said to be holding office of profit under the Government. The school was run by a registered Society.

26. Mr. Dwivedi has referred to the relevant provisions of section 26 of the Act and submitted that it would never be the intention of the legislature to create the office of Chairman or Vice-Chairman or Member to be office of profit and the honorarium contemplated under section 26 of the Act cannot be deemed as salary payable to them creating disqualification for the membership of Parliament or Assembly or to the members of the JAAC. He submitted that the Act has to be interpreted in a harmonious manner and not in a manner as to lead to an absurd and perverse conclusion. He placed reliance on AIR 1961 S.C. 1107 and AIR 1986 S.C. 137. Learned counsel has submitted that it is clear from section 3 of the JAAC Act that the continuance of members of JAAC of the nominated members, depending upon holding their membership of Legislative Assembly or Lok Sabha is a condition precedent for their nomination. Hence by no stretch of imagination it can be held that the office be held by members of Parliament or members of State Legislature and is an office of profit.

27. Mr. Dwivedi next submitted that respondent no. 1 was nominated as Chairman of Interim Council under section 23 of the JAAC Act by virtue of being a member of Lok Sabha. In the capacity of Chairman of Interim Council he was entitled to honorarium. Therefore, it is absurd to hold that the nominated Chairman was holding office of profit.

28. The contention of Sri Dwivedi that only a member of Parliament can be nominated as Chairman of Interim Council is founded on misleading provisions of section 23 of the Act. Sub-section (3) of section 23 lays down that the State Government shall nominate the Chairman and the Vice-Chairman of the Interim Council provided that a member of the Scheduled Tribes can only be nominated as the Chairman. Sub-section (2) of section 23 provides that the State Government shall nominate 50 per cent members of the Interim Council out of its total membership from the members of the Lok Sabha and the Legislative Assembly representing the constituency which lies wholly or mostly in the Area and from the members of Rajya Sabha and Legislative Council, who are the inhabitants of the area. Sub-section (2) also provides that the remaining 50 per cent members shall be nominated from amongst the persons who are inhabitants of the area and have interest in its development. It may be true that respondent no. 1 was nominated as Interim Chairman being member of Parliament but that was not a necessary qualifications for being nominated as Chairman. The only essential qualification was that the members nominated by the State Government shall be member of the Scheduled Tribes and hence any person who is inha-

bitants of the Area but not a member of the State Legislature or Parliament can be nominated as Chairman of the Interim Council.

29. The contention of Sri Dwivedi that to hold the office of the Chairman to be office of profit will lead to absurd result because if the election of Chairman of Interim Council is declared void, he will not only lose the seat in Parliament but also lose the post of Chairman of the Interim Council. Respondent No. 1, being a member of Scheduled Tribe could be nominated for the post of Chairman of Interim Council without being member of the State Legislature of the Parliament. It is submitted that it is clear that "honorarium" and "allowances" have been carefully chosen in the Act. It is submitted that there is nothing to prevent the legislature to choose the word "salary" or "remuneration" in this section if they intended the payment of remuneration to the Chairman of Interim Council would be profit. This contention also has no merit in view of several decisions referred to above.

30. Sri Dwivedi has relied on a decision in *Akluram Mahto Vs. Rajendra Mahto*, AIR 1999 S. C. 1259. In this decision it was held that a person holds an office of profit under the Government if the Government is : (1) the appointing authority (2) the authority vested with power to terminate the appointment; (3) the authority which determines remuneration; (4) the source from which the remuneration is paid; and (5) the authority vested with power to control the manner in which the duties of office are discharged. All factors need not be present. Whether stress will be laid on one factor or the other will depend on the facts of each case. But where several elements are present in a given case then the officer in question holds the office under the authority so empowered. This decision is also of no help to respondent no. 1. In this decision it was held that the Company did not hold the office under Central Government because power of the appointing authority was not exercised by the Central Government.

31. Mr. Dwivedi next contended that under section 36(2) of the Representation of People Act it is mandatory for the petitioner to file objection against the candidature of any candidate subject to statutory disqualification but the petitioner had not filed any objection hence he had no cause of action in the present election petition. This contention is devoid of any merit. If the petitioner is able to show that the respondent no. 1 was disqualified under Article 102(a) of the Constitution of India then he is entitled to relief and the election of respondent no. 1 has to be set aside. It is also contended that respondent no. 1 as Chairman of the Interim Council of JAAC enjoyed the status of Minister hence disqualification of respondent no. 1 was removed by Parliament (Prevention of Disqualification) Act, 1959. This contention has also no merit. The Act nowhere provides that the Chairman enjoys the status of Minister.

32. In the light of the decisions of the Supreme Court referred to above and the question in issue, it has to be decided whether Respondent No. 1 held (a) office under the State Government and (b)

whether it was office of profit. Respondent No. 1 was nominated Chairman of the Interim Council of JAAC under Sub-section (3) of section 23 of the Act. Sub-section (7) of section 23 provides that the Chairman shall hold the office during the pleasure of the State Government. Tenure of the respondent No. 1 was completely at the mercy of the State Government. Had respondent no. 1 being elected Chairman of regular Council constituted under section 3 of the JAAC Act, the position was otherwise. He was not removable by the State Government. Reference to the relevant provisions of the Act show that there is complete control of the State Government over the Interim Council. Section 42 of the JAAC Act, provides that the Council (which includes Interim Council) shall be guided by such direction on policy matters as may be given to it from time to time by the State Government. It may be stated that the Member of Parliament or Member of Legislature and some other authorities mentioned therein are disqualified for being chosen as Member of Council (Sub-section 2 of section 6 of the Act). Applying the test laid down by the Hon'ble Supreme Court, there can be no doubt that as Chairman of Interim Council the respondent No. 1 holds the office under the State Government.

33. The next question for consideration is whether the said office is office of profit. The answer must be in affirmative in view of section 26 of the Act. This section provides that the Chairman shall be entitled to (a) honorarium worth Rs. 1,750 per month; (b) daily allowance at the rate of Rs. 150 per day for the period spent outside the headquarters; (c) a first class or Air-conditioned 2 tier railway fare or air ticket in case tour is undertaken by the Chairman.

34. Section 2(a) of the Parliament (Prevention of Disqualification) Act, 1959 reads as follows :

"Compensatory allowance means any sum of money payable to the holder of an office by way of daily allowance or other allowance not exceeding the amount of daily allowance of Members of Parliament Act, 1954 (30 of 1954), any conveyance allowance, house rent allowance or travelling allowance for the purpose of enabling him to recoup any expenditure incurred by him in performing the functions of that office".

35. Clause (i) of Section 3 of the Parliament (Prevention of Disqualification) Act, 1959 reads as follows :—

"(i) the office of chairman, director or member of any statutory or non-statutory body other than any such body as is referred to in clause (h), if the holder of such office is not entitled to any remuneration other than compensatory allowance, but excluding (i) the office of chairman of any statutory or non-statutory body specified in Part-I of the Schedule and (ii) the office of chairman or secretary or any statutory or non-statutory body specified in Part II of the Schedule."

36. It therefore follows on reading of two provisions that while daily allowance and journey fair comes within the scope of compensatory allowance as defined in section 2(a) of the Act. Honorarium of Rs. 1,750 payable to the Chairman is outside the purview of compensatory allowance and Rs. 1,750 per month is pecuniary gain to the Chairman as held by the Hon'ble Supreme Court. I am, therefore, constrained to hold that the respondent no. 1 held the office of profit under the State Government and therefore he was disqualified under Article 102(a) of the Constitution of India for being chosen as Member of the Council of States. I further hold that disqualification was not removed by Parliament (Prevention of Disqualification) Act, 1959. The election of respondent no. 1 is therefore void and has to be set aside. Assuming that Respondent No. 1 at the time of filing nomination was not drawing any honorarium, this will not change the character of the office being office of non-profit.

37. The next question for consideration is whether the petitioner be granted declaration that he is elected to the Rajya Sabha. In *Vishwanatha Reddy Vs. Konappa Rudrappa Nadgouda*, AIR 1969 S.C. 604, it was held that when there are only two contesting candidates, and election of the returned candidate was found to be void on the ground of statutory disqualification on the date of filing nomination, the other contesting candidate can be declared elected and no fresh poll is necessary. It was also held that section 53 of the Representation of the People Act provides that if the number of contesting candidates is more than the number of seats to be filled, a poll shall be taken. In the present case there were eight candidates for seven seats. Since respondent No. 1 was disqualified to contest the election and his election has been held to be void, and election petitioner has to be declared elected.

38. Sri Dwivedi, learned senior counsel for respondent no. 1 has relied on *Keshav Lakshman Borker Vs. Dr. Deorao Lakshman Anande*, AIR 1960 S.C. 131 and submitted that even if the election of respondent no. 1 is set aside, the election petitioner cannot be declared to be elected. It may be mentioned that this decision was overruled in *Vishwanatha Reddy's case (supra)*.

39. In the result, the election petition is allowed and the election of respondent no. 1 Sri Shibu Soren to the Council of States in the election held in 1998 is declared to be void and the election petitioner is declared to have been duly elected to the Council of States. There shall be no order as to costs.

40. As required under section 103 of the Representation of the People Act, 1951, the substance of the decision shall be intimated to the Chairman of the Rajya Sabha and the Election Commission and the Registrar General shall forward the authenticated copy of the judgment to the Election Commission.

41. An application has been filed under section 116-B of the Representation of the People Act to stay the operation of this judgment to enable the respondent no. 1 to file appeal before the Supreme Court.

42. There are sufficient grounds to grant stay. The operation of the judgment shall remain stayed for three weeks to enable the respondent no. 1 to file appeal before the Supreme Court.

Sd/-

R. N. SAHAY,

Patna High Court,
10-05-2000.

[No. 82/CS-BR/5/98/2000]

By Order,

SHARAN PAL SINGH, Secy.

नई दिल्ली, 17 अगस्त, 2000

आ. अ. 136.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, भारत निर्वाचन आयोग 1991 की निर्वाचन अर्जी संख्या 4 में उलाहाबाद उच्च न्यायालय, लखनऊ बेंच, लखनऊ के तारीख 2-12-96 के निर्णय को एतद्वारा प्रकाशित करता है।

[निर्णय अधिसूचना की अंग्रेजी भाग में छपा है।]

[स. 82/उ.प्र.-लो. स./4/91 (लख.)]

आदेश में,

एल. एच. फारुकी, सचिव

New Delhi, the 17th August, 2000

O.N. 136.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgement dated 2-12-96, of the Allahabad High Court, Lucknow Bench, Lucknow in Election Petition No. 4 of 1991.

IN THE HIGH COURT OF JUDICATURE AT
ALLAHABAD LUCKNOW BENCH, LUCKNOW

Election Petition No. 4 of 1991

(Under Section 80/81 Representation of People Act 1951)

Sri Udai Raj Misra S/o Late Sri Basu Deo Misra R/o Saho Darapur Bhagawan Ki Chungi, Pratapgarh ... Petitioner,

Versus

Sri Abha. Pratap Singh R/o Quilla Pratapgarh City,
Pratapgarh and Others Opp. Parties,
Respondents.

Lucknow Dated 2-12-96

Hon'ble A.N. Gupta, J.

This Election Petition relates to election held for Xth Lok Sabha, full term of which has expired and the XI Lok Sabha has been constituted. The petition was based solely on the ground of irregularity in counting. The petitioner who is nearest defeated candidate had lost the election by a narrow margin of about 3000 votes. Some oral evidence had also been recorded in this case and an application for inspection of ballot papers was allowed by me on 21st August, 1995. Thereafter petitioner as well as respondent No. 1 who was declared elected and approached Hon'ble the Supreme Court but it dismissed both the Special Leave petitions on the ground that the term of Xth Lok Sabha had already expired and XI Lok Sabha has been constituted, and therefore no effective relief could be granted.

Now neither the petitioner nor opposite party no. 1 are present.

In these circumstances election petition is dismissed in default of parties with costs on parties. Petitioner shall be entitled to withdraw the security deposited by him in this petition. The record which had been summoned from the District Election Officer, Pratapgarh, shall be sent back to him.

Sd. - A.N. GUPTA

2-12-96

[No. 82/UP-HP/4/91(LKD)]

By Order,

L. H. FARUQI, Secy.

